1980

Davinci's, Inc. v. Utah Liquor Control Commission : Brief of Plaintiff in Support of Petition for Rehearing

Utah Supreme Court

Robert B. Hansen; John S. McAllister; Attorneys for Respondent;
Keith F. Oehler; Oehler & Lowe; Attorneys for Petitioner;

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVINCI'S, INC., a Utah corporation,	:	
Plaintiff,	:	No. 17043
v.	:	
UTAH LIQUOR CONTROL COMMISSION,	:	BRIEF OF PLAINTIFF
Defendant.	:	

BRIEF OF PLAINTIFF
IN SUPPORT OF PETITION

Petition for Rehearing

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CASES CITED

STATUTORY AUTHORITIES

STATEMENT OF THE NATURE OF THE CASE

Plaintiff seeks relief from a decision of the Utah Liquor Control Commission denying Plaintiff's application for a license to establish a state liquor store on the premises of Plaintiff solely for the reason that the premises of Plaintiff are within 600 feet of a public school when measured in a straight line.

RELIEF SOUGHT BY PETITION FOR REHEARING

Plaintiff respectfully petitions this Court to reconsider the sole issue on appeal of the manner in which the Commission may measure the 600-foot distance set forth in §32-1-36.15, Utah Code Annotated (Supp. 1979).

STATEMENT OF FACTS

Plaintiff is a family-style restaurant which applied to Defendant for the issuance of a license for the establishment of a state liquor store on the premises of Plaintiff at 2020 East 3300 South, Salt Lake City, Utah. Prior to Defendant's decision on Plaintiff's application, Plaintiff contacted compliance agents of Defendant regarding the question of whether the 600-foot proscription in §32-1-36.15, Utah Code Annotated (Supp. 1979) is applicable. Inquiry was made because of the location of a public school, to-wit: Evergreen Junior High School. The entrance to

the school is at 3401 South 2000 East, well beyond the proscription, but the school property extends into the interior portions of the block, thus prompting the inquiry.

Plaintiff completed its formal application to Defendant and filed it with Defendant on the 4th day of April, 1980.

On the 11th day of April, 1980, Defendant denied Plaintiff's application solely on the basis that the 600-foot requirement was not satisfied. Plaintiff's application fully satisfied all other statutory requirements, rules and regulations of the Utah Liquor Control Commission, and there were then and now are licenses available.

ARGUMENT

I.

DEFENDANT HAS NOT EXERCISED ITS PLENARY POWER TO DENY PLAINTIFF A LIQUOR LICENSE.

The Defendant would have given Plaintiff a liquor license in this case but for the 600-foot limitation in §32-1-36.15, Utah Code Annotated (Supp. 1979). There is no doubt that the Commission can not be compelled to grant Plaintiff a license in this case. The Commission has not acted arbitrarily or capriciously in this case. The Commission has, however, denied Plaintiff a license solely by reason of its interpretation of the 600-foot rule as requiring a straight-line, cross-fence measurement. The Commission has stated to

Plaintiff that it would have no reason not to grant a license to Plaintiff, and would grant it, if it could lawfully make the subject measurement according to the shortest walking distance.

II.

THE APPROPRIATE MANNER OF MEASUREMENT IS THE SHORTEST ROUTE OF ORDINARY PRACTICAL PEDESTRIAN TRAFFIC.

The statute here at issue, §32-1-36.15, Utah Code Annotated (1953), as amended, states, in relevant part, that:

> No state store . . . shall be established within a radius of 600 feet of any public . . . school . . ..

Defendant has not properly defined the term "radius" and has therefore improperly denied Plaintiff's application.

The Utah statute must be examined to include a determination whether the measurement is to be along the shortest practical route of actual pedestrian travel, or in a straight-line, cross-fence, crow-flies manner. Measurement along the shortest route of ordinary pedestrian traffic has been the better reasoned approach. In Hunt Club, Inc. v. Moberly, 407 S.W.2d 148 (Ky. 1966), the licensed premises were found not to be within a statutory 200-foot proscription, although the rear portions of the licensed premises and the church were within 200 feet, as the crow flies. The statute there provided that the measurement was to be taken on the street on which the licensed premises were located, in a straight line from the

nearest outside wall of the building on the licensed premises to the nearest outside wall of the church or school building. In construing the statute relative to the manner of measuring the distance from the church to the liquor store, the court there stated:

> By reading the latter part of the statute relative to making the "measurement," it is apparent the Legislature means that the measurement should be taken "on the street" where people travel, not as the crow flies.

See also, State Beverage Department v. Brentwood Assembly of God Church, 149 So.2d 871 (Fla. 1963) and cases annotated at 4 ALR3d 1250.

The Court has recently construed the term "radius" as used in §16-6-13.5, Utah Code Annotated (1953), as amended, (which reads substantially the same as the statute here presented, except that it provides for nonprofit clubs rather than state stores in restaurants) in Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979).

The statutory phrase "within a radius of 600 feet of any public or private school" was construed by the Court in that case, not in the literal, geometric sense, but in a sensible and practical way, in order to avoid an absurd and harsh result. The same phrase of the present statute should similarly be given a practical construction with regard to the manner of measurement.

A purpose of the present statute is to protect school students from possible improper influences that may be present from a family restaurant that serves wine and other

liquors with its dinner meals. (Id., Chief Justice Crockett concurring with comments.) If the measurement of the 600-foot proscription is made from the school and the area actually frequented by the school's students to the Plaintiff's restaurant, according to the shortest practical and reasonable route required by the students to be walked, the 600-foot requirement and the purpose of the statute are fully satisfied. The buildings, fences, and other obstructions between the restaurant and the school effectively protect the students from any improper influences of the restaurant, and the measuring of the 600-foot proscription according to the shortest practical route of circuitous travel, necessary for the students and others to walk from the school to the restaurant, satisfies the statutory requirement and protects the students by assuring a minimum reasonable distance between the restaurant and the school grounds and building.

CONCLUSION

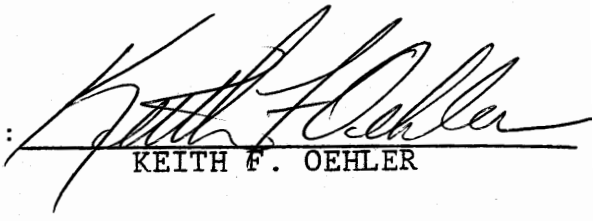
Since the school students cannot reasonably be expected to cross fences, climb walls, and walk through or over buildings, the measurement from the school to Plaintiff's restaurant should be made along the shortest, practical route of circuitous travel. To do so would result in a sensible and practical, and easily administered, construction of the present statute and would fulfill the purpose of the statute and the intent of the Legislature by avoiding a harsh or unreasonable

result. Defendant should be ordered to review the application of Plaintiff according to such manner of measurement.

DATED this 20th day of October, 1980.

Respectfully submitted,

OEHLER & LOWE, P.C.
Attorneys for Plaintiff

By: 
KEITH F. OEHLER

CERTIFICATE

I HEREBY CERTIFY that I delivered two (2) copies of the foregoing to the Utah Attorney General, State Capitol Building, Salt Lake City, Utah, on the 20th day of October, 1980, prior to filing the same, according to Rule 76(e)(1), Utah Rules of Civil Procedure.